Supreme Court, U.S.
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No. 94-661

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. GRACE & CO.-CONN., *Petitioner*,

v.

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, THE AETNA CASUALTY AND SURETY COMPANY and CONTINENTAL CASUALTY COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether diversity jurisdiction is properly invoked when, under any alignment of the parties to the original complaint, each party is diverse from every other party.

2. Whether this Court should review a court of appeals' application of state law to interpret the unambiguous terms of an insurance contract.

LIST OF PARTIES AND CORPORATIONS

In addition to the parties to the proceedings identified in the Petition for a Writ of Certiorari, Respondent Continental Casualty Company ("CCC") was a party in the courts below.

Pursuant to Rule 29.1, Respondent The Aetna Casualty and Surety Company ("Aetna") states that its parent corporation is Aetna Life and Casualty Company; Aetna has no subsidiaries. Respondent CCC states that its parent corporation is CNA Financial Corporation; CCC states that its only subsidiary that is not wholly owned is Agency Management Services, Inc.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In the early 1960's, W.R. Grace & Co.-Conn. ("Grace") began purchasing and operating businesses that were involved in the manufacture and sale of asbestos-containing products. Grace's primary liability insurer at that time was the Maryland Casualty Company ("Maryland"). Maryland continued to be Grace's primary insurer until 1973, when Grace began placing its primary coverage with CCC. In the early 1980's, Grace began to be named as a

defendant in a large number of asbestos-related lawsuits. Without conceding any obligation to do so, Maryland began paying insurance proceeds in connection with some of these claims. So did CCC.

In October 1983, Maryland filed a declaratory judgment action against Grace and CCC in the United States District Court for the Southern District of New York. Maryland sought rulings on whether it, CCC and/or Grace was actually responsible to defend the asbestos-related claims against Grace and to pay ensuing judgments and settlements. Grace did not cross-claim against CCC.

On April 30, 1984, Grace filed its own declaratory judgment action in the Superior Court for the District of Columbia against Royal Indemnity Company ("Royal"), which Grace believed to have insured one of the predecessor businesses that Grace had purchased in the early 1960's. In June 1984, Grace amended its complaint to add as defendants both Aetna and General Insurance Company of America ("General"), insurance companies that Grace believed had insured other predecessor companies. Grace was unable to locate the insurance policies allegedly issued by Royal, Aetna and General, and each denied having issued the alleged insurance policies.

In July 1984, Maryland sought leave to amend its complaint to add Royal, Aetna and General as defendants to its action. When leave was granted, Maryland amended its complaint to seek a declaration that Royal, Aetna and General were each obligated to participate with (or in lieu of) Maryland in the defense and indemnification of the asbestos-related claims against Grace. Grace cross-claimed

against Royal, Aetna and General. All three insurers continued to deny that they had issued the alleged insurance.

In 1991, the district court issued rulings on various cross-motions for summary judgment. On one issue, the trigger of coverage for so-called "property damage" claims against Grace, the trial court issued a Rule 54(b) judgment in favor of Maryland and Royal. Grace appealed to the Second Circuit. On appeal, Grace challenged both the substantive ruling and the district court's subject-matter jurisdiction.

Aetna appeared before the court of appeals to defend the district court's exercise of jurisdiction since, in the absence of jurisdiction, that court's resolution of the claims against Aetna by Maryland, CCC, General and Royal would be undermined.[1] On September 1, 1993, the Second Circuit denied Grace's jurisdictional challenge and reversed and remanded the trial court's substantive ruling.

In September 1993, both Grace and Royal filed timely petitions for rehearing and suggestions for rehearing in banc. In January 1994, the Second Circuit granted rehearing on its substantive ruling, only. Following rebriefing, the Second Circuit reaffirmed its original ruling in a decision issued May 16, 1994. (Pet. App. 3a). As it had on September 1, 1993, the court of appeals remanded to the trial court for "an examination of each underlying

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[1] In early 1992, soon after the appeal was filed, Aetna settled with Grace. Thereafter, Maryland and Aetna entered a settlement, which was contingent on the dismissal with prejudice of the cross-claims of CCC, General and Royal against Aetna. At a contested hearing, the claims of CCC, General and Royal against Aetna were dismissed with prejudice.

[asbestos building] claim to determine when property damage -- the installation of asbestos -- occurred." (Pet. App. 27a).

ARGUMENT

Review of this case in this Court is unwarranted. Although the Petition asserts the existence of a circuit conflict on the issue of jurisdiction, that supposed conflict is not presented by the facts of this case and would not be reached by the Court on review. The Petition's criticism of the Second Circuit's rationale on the substantive issue is an unimportant -- and unjustified -- attack on that court's resolution of a state law dispute.

1. THE SUPPOSED CONFLICT REGARDING THE PROPER TEST FOR ALIGNING PARTIES IN ORDER TO EVALUATE DIVERSITY JURISDICTION IS NOT PRESENTED BY THIS CASE

The Petitioner asserts that this Court should grant certiorari to resolve an asserted conflict among the circuits. The issue presented by the alleged conflict is whether, for jurisdictional purposes, parties must be aligned according to a "collision of interests" or a "primary purpose" test. For two reasons, this case does not present that issue.

a. *Under any alignment of the relevant parties, complete diversity exists.* Three years ago, in *FreePort-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), this Court explained that the addition of non-diverse parties to a pending action predicated on diversity jurisdiction will not destroy the federal court's jurisdiction over the action. Specifically, after observing that "[w]e have consistently held

that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events," this Court held that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." 498 U.S. at 428.

As the Petition demonstrates, at the time this action was commenced each party to it was diverse from every other party (Pet. at 4):

> At the time the lawsuit was filed, Maryland Casualty was a Maryland corporation with its principal place of business in Baltimore; Grace was a Connecticut corporation with its principal place of business in New York; [CCC] was incorporated in Illinois, with its principal place of business in Chicago.

Thus, at the time this suit was commenced, diversity jurisdiction was proper no matter how the parties were aligned.

Thereafter, Maryland Casualty sought and received leave to amend its complaint to add three additional parties as defendants: Aetna, Royal, and General. Two of those parties, Aetna and Royal, if aligned as plaintiffs, would not be diverse from Grace. Under *FreePort-McMoRan*, however, the citizenships of Aetna, Royal and General are irrelevant to the existence of diversity jurisdiction.

Because diversity jurisdiction exists under any alignment of the relevant parties, this case does not present the question of whether parties should be realigned in order to test the presence of diversity jurisdiction. The first

question raised by the Petition is simply not an issue that would be before this Court.

b. *The court below held that alignment was proper under any application of City of Indianapolis.* Although the Second Circuit held that realignment of parties to destroy diversity jurisdiction is required only if the "real interests" of the plaintiffs and defendants are not truly adverse (Pet. App. 13a), the court further found, under the facts of this case, that "realignment would be inappropriate even under the primary purpose test" (Pet. App. 15a). In other words, the Second Circuit evaluated the actual disputes among the parties in this case and found that, no matter how *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), is applied, realign- ment and dismissal would be inappropriate.

In *City of Indianapolis*, this Court explained that the appropriateness of realignment in any given case "is to be found not in legal learning but in the realities of the record." 314 U.S. at 69. The Second Circuit followed that instruction and performed the intensely fact-specific task of analyzing the actual disputes presented in this case. The Second Circuit found -- correctly -- that the disputes among Maryland and the various insurer-defendants (CCC, Aetna, Royal, and General) were substantial and that Maryland has prosecuted its claims against the insurer-defendants at least as vigorously as has Grace. (*See* Pet. App. 15a-16a). Accordingly, the Second Circuit (i) concluded that the primary purpose of this action -- resolving who, among all of the parties, is liable for certain asbestos-related claims -- pits each party equally against every other party (Pet. App. 15a-16a) and, therefore, (ii) held that there were "substantial

controversies" among the insurers that easily satisfied the "collision of interest" test (Pet. App. 16a-17a).[2]

Because the Second Circuit found that the alignment of the parties in this case is proper under any application of *City of Indianapolis*, any dispute as to how the ruling in that case should be applied to the actual disputes presented by this case is academic and inappropriate for certiorari review.

2. PETITIONER'S CRITICISM OF THE SECOND CIRCUIT'S ANALYSIS IS AN UNJUSTIFIED ATTACK ON THAT COURT'S RESOLUTION OF A STATE LAW DISPUTE

The Petitioner asserts that this Court should grant certiorari to review the Second Circuit's analysis of the meaning of an insurance contract governed by the state law of New York. The Petition acknowledges that the Second Circuit correctly understood and described the scope of its review function (Pet. at 18), but criticizes that court for then violating its role by "couch[ing]" a factual issue as a legal one (Pet. at 19). Even if the Petitioner's criticism was justified -- which it is not -- it does not present an important federal question.

The Second Circuit did not make factual findings. The question before the Second Circuit was "one of contract

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[2] The Petition deems significant that other circuits, faced with different parties and different disputes, aligned all insurers against a policyholder. Because the actual disputes in every coverage action are different, it can be expected that the "realities of the record" will cause courts to align insurers and policyholders differently in different cases. 314 U.S. at 69.

interpretation." (Pet. App. 18a). Specifically, the court was called upon to decide, under principles of New York state law, the meaning of two terms found in the relevant insurance contracts: occurrence and property damage. In a portion of the opinion not criticized by Petitioner, the court concluded that New York state courts would interpret the concept of an "occurrence," as used in the insurance policies, to require "damage-in-fact" during the policy period. The Second Circuit reached this conclusion upon analyzing the language of the pertinent insurance policy provision (Pet. App. 20a) and then considering state law cases applying that policy language (*id.*).

The court of appeals followed precisely the same analysis in concluding that New York state courts would interpret the concept of "property damage," as used in the insurance policies, to include the incorporation of asbestos-containing materials in a building (*i.e.*, installation), but not any effects of asbestos-containing materials following their installation. The Second Circuit reached this conclusion upon analyzing the language of the pertinent insurance policy provision (Pet. App. 23a) and then considering state law cases applying that policy language (Pet. App. 24a-26a). The Second Circuit then remanded to allow Grace to prove when, in each case for which Grace is held liable, property damage -- as that term is used in the insurance policies -- occurred. (Pet. App. 27a-28a). The court made no improper factual finding.[3]

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[3] Petitioner argues to this Court, as it argued to the court of appeals, that it should be entitled to a remand to prove that asbestos is released in building atmospheres after installation. (Pet. at 22, 24). The Second Circuit did not remand this action to allow the Petitioner to prove that contention *because the court of appeals had already assumed, for purposes of its decision, the contention to be true.* (Pet. App. 26a). Even so, the court of appeals held, the release and re-entrainment of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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asbestos fibers does not cause property damage, as that term is used in the insurance policies. (*Id.*).